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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KEVIN BARRY EDWARDS, Defendant and Appellant.	A123470 (Alameda County Super. Ct. No. C151429)

The two issues in this appeal relate to the trial court's denial of Edwards's motions to discharge his privately retained counsel. One motion was made approximately a month before trial and renewed the morning trial began. The other was made after the verdict. We affirm the ruling on the motion before trial, but conclude it was error to deny the posttrial motion. Accordingly, we reverse and remand to allow referral of Edwards for appointment of counsel.

FACTUAL AND PROCEDURAL BACKGROUND

James Lee was robbed by a man with a gun. He later identified Edwards as the robber in a photo, a lineup, and in court. A few days before Lee was robbed, a man with a gun robbed Alan Dreyfuss. He also identified Edwards as the robber in a lineup and in court. Edwards does not challenge the sufficiency of the evidence to support his convictions based on those identifications and events.

Edwards was initially represented by court-appointed counsel, but retained counsel William Du Bois appeared with Edwards at the second day of the preliminary hearing

and represented him throughout the proceedings.[1] An information was filed in December 2005 charging Edwards with the robberies of Lee and Dreyfuss, enhanced due to his use of a firearm, and possession of a firearm by a felon.[2] The information also alleged a prior strike conviction and several prior prison terms. The trial date was continued repeatedly.[3] In March 2008, the case was scheduled for disposition and trial setting to discuss a possible plea bargain, and a series of such hearings followed over the next six months. The plea negotiations were ultimately unsuccessful.[4]

The case was tried in October 2008, following Edwards's withdrawal of his waiver of speedy trial rights. A jury convicted Edwards as charged. The court found true four of the five alleged prior convictions, denied Edwards's motion to disregard his prior strike conviction for sentencing purposes, and sentenced Edwards to an aggregate prison term of 34 years and eight months.[5] Edwards timely appealed.[6]

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[1] Edwards's mother appeared in court at the preliminary hearing, and it was continued so she could retain counsel to represent her son.

[2] The information also charged one count of residential robbery of a separate victim and an additional count of second degree robbery of yet one more victim. Those counts were dismissed on a defense motion during trial.

[3] The May 2006 trial date was continued to September 2006 because Du Bois was engaged in another trial. The September 2006 date was continued because the deputy district attorney was unavailable. Additional continuances followed for reasons that are not explained.

[4] During a May 2008 hearing at which a colleague appeared for Du Bois, after the court stated Du Bois had asked for a two-week continuance, Edwards said: "I've been waiting for three years. I'm ready to get this going." Edwards gave the court a hand-written one-page document, entitled "995 Motion" and "1385 Motion," that listed several motions he wanted to make, and requested transcripts of his preliminary hearing and police reports. The court continued the case for two weeks, and told Edwards it hoped the case could be resolved before trial, but if not, any motions should be completed and the case should move on to trial.

[5] The court also awarded 1,497 days of custody credits, ordered Edwards to submit samples for DNA testing, and imposed various fines and fees.

[6] This court has ordered that Edwards's premature notice of appeal, filed after he was convicted but before he was sentenced, will be treated as timely.

DISCUSSION

A. *Standards That Govern Our Consideration of Edwards's Right to Counsel*

A criminal defendant has a constitutional right to assistance of counsel at all critical stages of the proceedings. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) If he is indigent, he is entitled to the assistance of counsel appointed by the court. In order to discharge his court-appointed attorney, the defendant must show that his representation is inadequate, or that an irreconcilable conflict has arisen between him and his lawyer. (*People v. Marsden* (1970) 2 Cal.3d 118, 123-125.)

When the defendant can afford a lawyer, he or she has the right "to appear and defend with retained counsel of his or her choice." (*People v. Lara* (2001) 86 Cal.App.4th 139, 152.) A defendant who files a timely motion to discharge retained counsel is not required to show inadequate representation or an irreconcilable conflict with the attorney, but may discharge the lawyer "so long as the discharge will not result in prejudice to the defendant or in an unreasonable disruption of the orderly processes of justice." (*People v. Ortiz* (1990) 51 Cal.3d 975, 979.) The trial court's consideration of such a motion is entrusted to the reasonable exercise of its discretion. (*Id*. at pp. 983-984; see also *People v. Lara*, *supra*, at p. 153 [the court must balance the defendant's interest in new counsel against the disruption caused by the substitution].) Automatic reversal is the remedy if we conclude the motion is improperly denied. (*People v. Ortiz*, *supra*, at p. 988; *People v. Munoz* (2006) 138 Cal.App.4th 860, 870; *People v. Lara*, *supra*, at pp. 154-155.)

B. *Proceedings in the Trial Court*

The proceedings that bear on our consideration of this appeal began on September 10, 2008, approximately three years after Edwards's preliminary hearing. His retained counsel, William Du Bois, filed a motion to withdraw as defense counsel on the grounds that Edwards had failed to pay his fees. The court set a hearing on the motion two days later. But Du Bois's motion to withdraw was not mentioned during that hearing. Instead, the court informed Edwards it would set his case for trial three days later because there

had been many delays, and Du Bois had told the court he could be ready. The court also told Edwards that he could continue plea bargaining in the meantime.

When the parties appeared three days later on September 15, Du Bois informed the court that his client wanted to go to trial and Edwards said he wanted to file some pretrial motions, but had not been able to do so because Du Bois was too busy. A short colloquy ensued regarding the plea negotiations and Edwards's desire to go to trial so he could challenge witness identifications, when Du Bois interjected: "He wants me to withdraw from the case, which would be great." The court told Du Bois, "You've been counsel of record for a long, long time in this case so that motion is denied."

After the court's ruling, Du Bois stated that Edwards wanted "to set a *Marsden* motion," and Du Bois was "happy to file papers in support of [Edwards's] request." When the court asked if he wished to have the *Marsden* motion heard that same day, Du Bois reported that Edwards was not prepared to proceed, but could be in a day or two. The prosecutor then clarified that Du Bois was retained counsel, and since *Marsden* was not applicable, Edwards's remedy was to hire new counsel. The court agreed. Du Bois told the court: "That's not going to happen. His mother hired me. She's deceased." The court stated: "All right. I'm just going to leave it at a trial date of October 14th." Edwards did not request appointment of counsel in that hearing.

When trial began on October 14, the court denied Edwards's *Marsden* motion on the ground that the *Marsden* procedure did not apply because Du Bois was retained counsel. The court also denied Du Bois's motion to withdraw as "untimely and insufficient," noting that an earlier motion based on essentially the same grounds had been denied by the calendar court. Du Bois then advised the court that he and Edwards had a serious conflict of interest, and Edwards filed the *Marsden* motion because he wanted to fire him. Edwards confirmed that he wanted to fire Du Bois. When the court stated the alleged conflict of interest should have been raised before the first day of trial, Edwards claimed he had filed such a motion two years earlier, but the court was unable to locate it in the file. After the court remarked that upon review of three years of proceedings there was never a mention that Edwards was dissatisfied with his lawyer,

Du Bois explained, "I moved to withdraw because I don't want it to be an issue on appeal that I invited error by going into a trial when I had a conflict of interest with my client." The court conducted a hearing outside the prosecutor's presence. Du Bois disclosed that the conflicts with his client were based on Edwards's demands for copies of documents in Du Bois's file, and Du Bois's acquaintance with a prosecution witness. The main point of contention between them was apparently resolved during the hearing. After further discussion, Edwards told the court that so long as Du Bois would personally represent him at trial (rather than assigning someone else from his office), Edwards would not fire him. Du Bois agreed to do so.

The next day, Du Bois told the court that Edwards did not want to proceed to trial with Du Bois because he did not think Du Bois was trying hard enough. The court responded: "I thought we discussed all this yesterday, and the last I heard yesterday was your client was very satisfied with you to the point he wanted to make sure it wasn't going to be another lawyer from your office trying the case, and once he learned it was you, he was satisfied." The court noted that in the three years he was waiting for trial, Edwards had plenty of time "to get the lawyer he wanted."

In response Edwards insisted: "Now I'm firing him." The court asked Edwards if he wished to represent himself because the court did not intend to further delay the trial because "[t]he witnesses [were] out in the hallway." During the ensuing discussion, Edwards stated he wanted the record to reflect that he was firing Du Bois, and the court responded that "the record will also reflect that you have not expressed a willingness to represent yourself, you also do not have another lawyer available to proceed, and that the matter has been waiting for trial for almost four years, and now you've come to my court yesterday and all of a sudden now you want me to delay it by getting another lawyer." The court invited Edwards to bring in another lawyer who was ready to represent him, but declined to give Edwards "five to seven days to get this together . . . ." At no time during the discussion did Edwards or Du Bois state that Edwards was indigent or that he wanted court-appointed counsel.

On the third day of trial, while in limine motions were being heard and the jury panel was in the assembly room, Du Bois presented the court with a document handwritten by Edwards that reiterated his desire for a different attorney and asked why the court was "denying him his right to his counsel of choice." After the court explained again that Edwards had more than three years to obtain another lawyer, Du Bois stated: "[W]hen the defendant says he wants another lawyer, what he really means is he wants to be interviewed by a public defender to see if they can represent him, or court-appointed counsel. He doesn't have the financial means to proceed to hire a lawyer. [¶] . . . [Y]ears ago I was hired by his mom to do the preliminary examination. I'm prepared to go forward with this trial at this time. I feel that I am well prepared to represent him and will do so to the best of my ability at this time, subject to what I've said in my motions to withdraw and the obviously currently existing conflicts between myself and the client on the facts of the case. And the merits of the case, I'm prepared to proceed and defend him. [¶] But that's why there may be some confusion in the Court's communications with the defendant. He doesn't have money to bring a lawyer in here. His thought is if I'm removed, he'll be interviewed by the public defender's office and proceedings will go that way."

The court responded: "Well, that's certainly the first I've heard of that request and the first I've heard of that set of circumstances, and that certainly is way too late for this Court to do anything about it." The court stated the issue should have been raised in the calendar court "a long time ago," and it viewed the request "as an effort to manipulate the Court and the Court's schedule . . . ." The court also observed: "Mr. Edwards may get a lawyer he likes better, but he's not going to get a better lawyer than the one he has now."

After the verdict, Edwards personally filed another *Marsden* motion that sought to relieve Du Bois for allegedly inadequate representation. His memorandum of points and authorities said he was "seeking to have all of the procedures stopped," and requested "a

new trial or a mistrial."[7] During the court trial on his prior convictions, Edwards again repeated his desire to fire Du Bois, and the court again asked if he had another lawyer or wished to represent himself. Edwards asked for a two-week continuance "to where I can get me a new lawyer in here to get my new trial motion together," but neither Edwards nor Du Bois requested a court-appointed attorney. After another extended interchange, the court told Edwards it would give him two weeks to get another lawyer, and Edwards agreed. The court declined to relieve Du Bois until Edwards obtained substitute counsel.

When the proceedings resumed a couple of weeks later, Edwards filed another *Marsden* motion. Du Bois told the court Edwards wanted to replace him, and characterized himself as "volunteer counsel" because he was hired for the preliminary hearing but not the trial. The court agreed and said it had continued the proceedings so Edwards could replace Du Bois. Edwards then requested a public defender to replace Du Bois, and the court denied the request, stating "the Court sees no reason to refer this now and make this the public defender's office problem. I think you have been well represented all the way along . . . . That would be a sharp practice if every time somebody hired a lawyer and if things didn't go well for them, they could say, 'Now I'm out of money, and I want the public defender because I want to bring a motion for new trial on this guy I hired.' I'm not doing it."[8] The court reiterated that Edwards had waited until being sent out for trial to decide he wanted a different lawyer, and "that's too late." The court also commented Du Bois "did an excellent job and as good a job as

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[7] Edwards's memorandum of points and authorities also cited *Ortiz* for the general proposition that a defendant who becomes indigent may discharge retained counsel and request appointed counsel as long as the request is timely and will not significantly prejudice the defendant, although Edwards did not specifically request such appointment of counsel by the court.

[8] The court initially reacted to Edwards's request for appointed counsel during the continued court trial on the priors by stating, "Well, you never made that request before." However, Du Bois earlier mentioned Edwards's desire for appointed counsel on the third day of trial, when the court denied the request on the grounds it was untimely and reflected an intent to manipulate the court and delay the proceedings.

could have been done on the facts of this case," noting that he was successful in excluding evidence concerning a third victim that resulted in dismissal of that charge.

C. *Analysis*

A defendant's right to discharge retained counsel is not absolute, but turns on the trial court's exercise of discretion to consider whether discharge is untimely and would result in an unreasonable disruption of the orderly processes of justice. (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 983.) Edwards argues the trial court must have incorrectly applied this standard when it denied his initial motion to discharge Du Bois. Because there was no pending trial date when the motion was first made to the calendar judge, he argues "no reason appears in the record" that could support denial. We read the record differently.

When the court was first informed of Edwards's dissatisfaction with Du Bois, the case had been pending for over three years. Edwards had just stated his desire to proceed to trial, and the calendar judge accommodated him by assigning an October 14th trial date. When the calendar judge denied the motion to withdraw, he said, "Mr. Du Bois, you've been counsel of record for a long, long time in this case. So that motion is denied." The clear import of the proceedings is that the court was concerned over the disruption and delay that would be occasioned by a search for replacement counsel. Nevertheless, the court observed that Edwards could hire a new lawyer. Implicit in the colloquy is the fact that Edwards could do so provided he did not use the change in counsel to further delay the proceedings.

The discussion that ensued concerning Edwards's desire to bring a *Marsden* motion does not change our analysis. Whether the court was or should have been aware that Edwards was indigent and entitled to court-appointed counsel at this juncture is immaterial to the court's refusal to discharge Du Bois from his responsibilities. A motion to discharge retained counsel must be timely. "The right to discharge retained counsel is not absolute . . . and the court may exercise discretion to ensure orderly and expeditious judicial administration if the defendant is 'unjustifiably dilatory or . . . arbitrarily desires to substitute counsel at the time of trial.' " (*People v. Lara*, *supra*, 86 Cal.App.4th at p. 153; see also *People v. Keshishian* (2008) 162 Cal.App.4th 425, 429 [court properly

denied "last-minute attempt to discharge counsel and delay the start of trial"]; *People v. Turner* (1992) 7 Cal.App.4th 913, 918- 919 [motion to discharge retained counsel on day of trial would properly have been denied]; *People v. Lau* (1986) 177 Cal.App.3d 473, 479 [motion to replace retained counsel on day of trial properly denied].)

We have no reason on this record to suspect the calendar judge denied the motion to discharge Du Bois for any reason other than his concern that continuing the proceedings to allow Edwards to secure replacement counsel would be unduly disruptive. We have a similar view of the record of the renewed motion to discharge Du Bois made during trial. The motion was denied as "untimely and insufficient," and the court specifically referred to the earlier denial by the calendar judge. When Du Bois raised the possibility of a conflict of interest between him and Edwards, the court explored the basis for the possible conflict in an in camera hearing.

The court's willingness to explore the possible basis for a conflict of interest does not demonstrate that the trial judge applied an inappropriate standard to the motion to discharge. The motion was denied because granting it would have been unduly disruptive of the trial. In the circumstances, it appears the court explored the potential conflict of interest after denying the discharge motion to ensure there was no impediment to Du Bois's ability to provide Edwards effective representation. (See *People v. Bonin* (1989) 47 Cal.3d 808, 833-834, 836-837.) Indeed, the court has an obligation to inquire into such a possible conflict of interest on the part of defense counsel, and "to act in response to what its inquiry discovers." (*Id*. at p. 836.)

Not only was the alleged conflict an insignificant burden on Du Bois's ability to represent Edwards, but Edwards disavowed its significance when he reaffirmed that he wanted to proceed to trial with Du Bois as his lawyer during the in camera hearing. When Edwards changed his mind the following morning, the trial judge denied the request to discharge Du Bois out of concern that granting it would disrupt the trial. The motion was renewed again on the third day of trial, and for the first time, Du Bois informed the court that Edwards was indigent. But as we said above, Edwards's indigency does not bear upon whether the court was required to discharge Du Bois.

Instead, it bears upon whether Edwards should have been referred for appointment of a public defender in the event the court determined that discharge of Du Bois would not cause an undue disruption of the proceedings. For this reason, even though we understand and appreciate the trial court's legitimate concern to efficiently process the case to judgment, we must conclude there was error associated with the ruling on Edwards's posttrial motion to withdraw.[9]

Following the verdict, at the outset of trial by the court on the prior offense allegations, Edwards again moved to discharge Du Bois. The court continued the proceedings for two weeks to allow Edwards to find substitute counsel. When it granted this continuance, the court was presumed to know that Edwards was indigent because he and Du Bois so informed the court on the third day of trial. Nevertheless, the court did not refer Edwards to the public defender's office for possible appointment of counsel, and Edwards's efforts to retain a new lawyer on his own were unsuccessful. In these circumstances, the court erred.

Implicit in the court's decision to afford Edwards two weeks to find a new lawyer is an underlying determination that continuing the proceedings for this purpose would not be unduly disruptive. After giving Edwards the time, in these circumstances, the court should have also given Edwards the means to secure representation and referred him for appointed counsel. Even though Edwards did not remind the court of his indigent status until he was back in court with Du Bois following expiration of the continuance, the court was made aware of it during trial. "The semantics employed by a lay person in asserting a constitutional right should not be given undue weight in determining the protection to be accorded that right." (*People v. Marsden*, *supra*, 2 Cal.3d at p. 124.) We will not hold Edwards's failure to remind the court of his indigency against him, even though we in no way condone all the eleventh hour attempts by Edwards and his lawyer to secure a change in counsel.

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9 At oral argument, the Attorney General acknowledged that Edwards has a stronger argument that he should be appointed new counsel for posttrial proceedings.

The error here is per se prejudicial and requires a reversal of the judgment. But our reversal does not require an automatic retrial. (See *People v. Munoz, supra*, 138 Cal.App.4th at pp. 870-871.) Edwards should be referred to the public defender for appointment of counsel. If he is eligible for appointment, the case should proceed anew from the point of Edwards's posttrial motion to discharge his attorney.

DISPOSITION

The judgment is reversed and remanded to allow referral of Edwards for appointment of counsel. If Edwards was eligible for appointed counsel as of December 4, 2008, the day Edwards made his posttrial motion to discharge his attorney, all rulings that were made after that date shall be vacated and the court shall make an appropriate appointment of counsel to represent Edwards with respect to all such matters that were or could properly have been considered as of that date. If Edwards was not eligible for appointed counsel as of that date, the court shall reinstate the judgment.

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Siggins, J.

We concur:

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McGuiness, P.J.

_____
Pollak, J.